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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JAMES P. SUTHERLAND,

Petitioner,

V.

BRONTE C. SUTHERLAND,

Respondent.

Petition for a Writ of Certiorari to the California Court of Appeal

BRIEF AMICUS CURIAE OF INSTITUTE IN BASIC LIFE PRINCIPLES; FOCUS ON THE FAMILY; FAMILY RESEARCH COUNCIL; FREE CONGRESS EDUCATION & RESEARCH FOUNDATION; CONCERNED WOMEN FOR AMERICA; EVANGELICAL CHILD AND FAMILY AGENCY; NEW LIFE FAMILY SERVICES; TRADITIONAL VALUES COALITION; AND FAMILY VALUES ALLIANCE; IN SUPPORT OF PETITIONERS

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CASES: Page

Maynard v. Hill,
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Trustees of Dartmouth College v. Woodward,
17 U. S. 518 (1819)..... 4

United States Trust Co. v. New Jersey
431 U. S. 1 (1977)..... 6

OTHER AUTHORITIES:

Black's Law Dictionary
Fifth Edition..... 4

Brody, *California's Divorce Reform: Its Sociological Implications*,
1 PACIFIC LAW JOURNAL (1970) 15

Brown, *Charge to the Commission*,
(1966)..... 15

Carter and Glick, *Marriage and Divorce: A Social and Economic Study*,
(1970)..... 10

Chapman, *Fairness for Families: An Organizing Theme for the Administration's Social Policies*,
2 THE JOURNAL OF FAMILY AND CULTURE (1986)..... 13

Dawson, *Family Structure and Children's Health and Well-Being: Data From 1988 National Health Interview survey on Child Health*, (1991)..... 10, 12

Dohrenwend and Dohrenwend, *Social Status and Stressful Life Events*,
28 Journal OF PERSONALITY AND SOCIAL PSYCHOLOGY 225 (1973)..... 10

Final Report of the Assembly of the Judiciary, (1965) 14

Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OREGON LAW REVIEW (1984) 16

Galston, *A Liberal-Democratic Case for the Two-Parent Family*, 1990-91 THE RESPONSIVE COMMUNITY 14 11

Glen and Kramer, *The Marriages and Divorces of the Children of Divorce*, 49 J. OF MAR. AND FAM. 811 (1987) 14

Glendon, *Abortion and Divorce in Western Law*, (1986) 7, 16, 18

Goldstein and Gitter, *On Abolition of Grounds for Divorce: A Model Statute and Commentary*, 3 FAMILY LAW QUARTERLY 75 (1969) 7, 18

Homes and Rahe, *The Social Readjustment Scale*, 11 JOURNAL OF PSYCHOSOMATIC RESEARCH 213 (1967) 15

Knight and Prentky, *The Developmental Antecedents and Adaptations of Rapist Subtypes*, 14 CRIMINAL JUSTICE AND BEHAVIOR (1967)..... 13

Marvell, *Divorce Rates and the Fault Requirement*, 23 LAW & SOCIETY REVIEW (1989)..... 15, 17

McLanahan, *Family Structure and Dependency: Early Transitions to Female Household Headship*, 25 DEMOGRAPHY (1988) 14

National Commission on Children, Beyond Rhetoric–A New American Agenda for Children and Families, (1991) 5

Nelson, Farberow and Litman, *Youth Suicide in California: Comparative Study of Perceived Causes and Interventions*, 24 COMMUNITY MENTAL HEALTH JOURNAL (1988) 12

News Release from the Office of Assemblyman Pearce Young (1963) 7

Norval and Kramer, *The Marriages and Divorces of the Children of Divorce*, 49 JOURNAL OF MARRIAGE AND THE FAMILY (1987)..... *passim*

O'Gorman, *Lawyers and Matrimonial Cases: A Study of Informal Pressures in Private Professional Practice*, (1963) 16

Redman, *Matters of Consequence: If Fault Finding in Divorce Is an Anachronism, Then So Is Marriage*, 29 ADVOCATE 5 (1986)..... 9

Reppy, *The End of Innocence: Elimination of Fault Law in California Divorce Law*, 17 UCLA LAW REVIEW 1306 (1970) 4, 8

Rheinstein, *Marriage, Stability, Divorce and the Law*, (1972) 14

Sampson, *Crime in Cities: The Effects of Formal and Informal Social Control*, (1987)..... 13

Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, (1991) 5

Smith and Jarjoura, *Social Structure and Criminal Victimization*, 25 JOURNAL OF RESEARCH IN CRIME AND DELINQUENCY (1988)..... 13

Stein, Newcomb and Bentler, *An 8-Year Study of Multiple Influences on Drug Use and Drug Use Consequences*, 22 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY (1987)..... 13

Sterling, *Women Who Remain Divorced: The Long-Term Economic Consequences*, 70 SOCIAL SCIENCE QUARTERLY 11

Tonry and Morris, *Crime and Justice* .(1987)..... 13

The Economics of Family Disruption, Statistical Brief Bureau of the Census, (1991)..... 11

Walker, *Beyond Fault: An Examination of Patterns of Behaviour in Response to Present Divorce Laws*, 10 JOURNAL OF FAMILY LAW (1970)..... 15

Wardaski and Harris, *Adolescent Suicide: A Review of the Influences and Means for Prevention* 32 SOCIAL WORK (1987) 12

Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BRIGHAM YOUNG UNIVERSITY LAW REVIEW 79 (1991) 16

Webster-Stratton, *The Relationship of Marital Support Conflict and Divorce to Parent Perceptions, Behaviors, and Childhood Conduct Problems*, 51 JOURNAL OF MARRIAGE AND THE FAMILY (1989)..... 12

Weitzman, *The Divorce Revolution*, (1985)..... *passim*

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MOTION TO FILE BRIEF

Come now the *amici curiae*, by their attorneys, and move this Court for permission to file an *amici curiae* brief in support of petitioner in this case. The attorney for the Petitioner has agreed to allow the *amici* to file a brief, but the attorney for the respondent has refused to give permission. This motion is based on Supreme Court Rule 37.4. The interest of the *amici* is explained in the following brief.

STATEMENTS OF INTEREST

Amici are a) organizations engaged in providing services to children and families which face increased burdens serving children and single parents because of family breakdown, or are b) education, research and advocacy organizations supporting the institution of the family as traditionally understood. *Amici* endorse the position of the petitioner that the state must not sanction the nonconsensual destruction of families and of the mutual obligations inherent in a marriage without the opportunity of due

process. They join in urging the Court to review this case. Particular statements of interest for each *amicus* are provided in the Appendix to this brief.

The *amici* share a common interest in legal protection of marriage and in the support and encouragement of families of two natural parents and their children as the central unit of human society. Numbers of persons in the various other family arrangements which are being substituted are considerably increasing, at exorbitant cost to government and to society, as detailed in this brief. Such increasing costs are not associated with intact traditional families. This brief is being filed in support of the petition herein because much of the information may not be available to the Court.

SUMMARY OF REASONS FOR GRANTING THE PETITION

States use this Court's decision in *Maynard v. Hill*, 125 U.S. 190 (1888) to justify modern no-fault laws. The results have been devastating. Using *Maynard v. Hill*, courts deny marriages entered into before passage of the state no-fault law any protection under the Contract Clause, Article I, Section 10. Marriages entered into when state laws granted protection now find it stripped away by legislative impairment of their marriage contract..

While no-fault procedures have spread to nearly all state jurisdictions in some form, nonconsenting spouses have been afforded no constitutional protection of their marriage as states fail to understand their constitutional obligation to treat marital contracts as legal contracts in contested divorce proceedings, erroneously relying on *Maynard*. Further, states deny due process under the Fourteenth Amendment to partners wanting to salvage their marriages. Rather than having to actually prove "irreconcilable differences," spouses who want to end the marriage simply have to say they want out, and that is deemed sufficient evidence of "irreconcilable differences." Such procedures grant inadequate due process to the other marriage partner.

No-fault laws fail to respect not only the constitutional interest inherent in marriage as contract, but are improperly premised on state control of marriage as mere status, ignoring the traditional understanding of marriage as contract. After twenty years, the result of no-fault divorce is only now being understood by social researchers. Divorce rates accelerated after no-fault and have remained at higher levels contrary to the legislative intent to facilitate spousal reconciliation. Also, the increasing verdict of these researchers demonstrates the devastating social destruction delivered by no-fault divorce. This brief chronicles the shocking evidence of increased poverty, suicide, illness, school failure, crime, drug abuse and second-generation divorce produced by no-fault divorce laws. The social costs attendant to divorce are so high, and still rising, as to impeach no-fault as sound law or public policy. The result of no-fault is no less than disastrous.

ARGUMENT

I.

California's Retroactive Treatment of Pre-1969 Marriage in No-Fault Divorce Proceeding Presumed Marriage Was Mere Status, Ignored Statutes Characterizing Marriage as Contract, and Violated Petitioner's Fundamental Constitutional Interest.

The California Court of Appeal incorrectly used this Court's decision in *Maynard v. Hill*, 125 U.S. 190 (1888) to deny marriage contracts protection under the Contract Clause Article I, Section 10. *Amici* concur with Petitioner that as the California Court of Appeal erroneously applies *Maynard* to the present case, the effect of *Maynard* as applied to states, not territories, must be corrected. The 1888 Supreme Court likely did not understand that it would be later understood to give express permission to states to pass divorce laws facilitating the termination of marriage without breach, by

effectively, but erroneously, placing the subject of marriage outside the Contract Clause. Petitioner has persuasively shown in his petition on file herein that such a result required a misreading of *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

The present case is important for this Court to consider because no-fault divorce laws represent a new view of marriage, a virtual paradigm shift from marriage as contract and status to marriage as mere status.[1] Marriage is a covenant or contract between two people. The success or failure of a marriage affects many others besides the two partners of the marriage. The modern view improperly and myopically focuses on marriage as the personal status of an individual. This marriage-as-status view exalts personal autonomy and happiness and ignores the personal responsibility inherent in all other contracts. People cannot breach their (marriage) contracts without consequences to themselves and to others. The modern view ignores that reality by focusing on the person's desire to "change his or her marital status."

The new law effectively ignored Civil Code Sections 4100 and 5100, which expressively treat marriage as contract and remain valid laws in California. Accordingly, Petitioner rightfully claims his pre-1969 marriage is something more at law than mere status; he asserts the right to retain his marriage (because it is both status and

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1. This distinction is extremely important, as California well understood in 1969, that its legislation treated marriage as status. *See generally*, Susan W. Reppy, Comment, *The End of Innocence: Elimination of Fault in California Divorce Law*, 17 UCLA L. REV. 1306 (1970); *See also* "Marriage," Black's Law Dictionary 5th Ed. (1979) ("Marriage . . . is the legal status, condition, or relation of one man and one woman united in law for life, or until divorced, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex. A contract, according to the form prescribed by law by which a man and woman capable of entering into such contract, mutually engage with each other to live their whole lives (or until divorced) together in state of union which ought to exist between a husband and wife.")

contract) until he has been fully afforded due process with evidence presented of his breach of the marital contract.

The case is also important because state legislatures need to be reminded that individuals, like Petitioner, have, as against state action, constitutionally protectible interest in their marriage. When states reduce marriage to mere status, following trends of deconstruction and reductionism, they are vulnerable to constitutional challenge. Marriage has long been understood to be, by nature and common definition, both a status and contract having dual characteristics, analogous to other hybrid legal realities, e.g., lease (conveyance and contract) or consent decree (judgment and contract). Without legal protection for marriage in its full definition, marriage loses. Marriage as mere status can encourage excessive personal autonomy that avoids familial responsibility to pay alimony and child support.[2] That stable marriages are beneficial to society is now obvious from recent studies.[3] Alternative family arrangements are associated with increasing incidences of social harm at high cost. No-fault laws not only have helped divorce rates rise by denying non-consenting spouses a right to be heard and encouraging divorce instead of reconciliation efforts, but they send a message that marriage is not legally significant. The state, ignoring marriage as contract and the parties' contractual expectations, allow divorce for no reason, and prefers quick divorce to the difficulty of repairing a damaged marital

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2. Carl Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 B.Y.U.L. Rev. 197, 197 ("The riddle of alimony is why one former spouse should have to support the other when no-fault divorce seems to establish the principle that marriage need not be for life and when governmental regulation of intimate relationships is conventionally condemned.")

3. NATIONAL COMMISSION ON CHILDREN, BEYOND RHETORIC—A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES, SUMMARY, 66 (1991) ("When parents divorce or fail to marry, children are often the victims. Children who live with only one parent, usually their mothers, are six times as likely to be poor as children who live with both parents. They also suffer more emotional, behavioral, and intellectual problems. They are at greater risk of dropping out of school, alcohol and drug use, adolescent pregnancy and childbearing, juvenile delinquency, and mental illness.")

relationship. The research returns are in. That message is one we can ill-afford. This *amicus* brief, in part, relies upon recent research to show that the risk of harm and rising costs associated with easy divorce and non-marital family arrangements cannot stand. Sound jurisprudence and public policy must be based upon protecting the constitutional interests that inhere in marriage. It is the only way out.

II.

California's Interest in No-Fault Divorce Is Outweighed by Petitioner's Interest in His Marriage.

No-fault divorce, by its nature, facilitates access to courts to secure a quick divorce; it does not require efforts to save marriage. It devalues marriage and defeats the expectations of the nonconsenting spouse, facilitating a family breakup that risks harm to children. No-fault works counterproductively, even nonconstructively, to create alternative family arrangements that society cannot afford. The research studies cited in this brief lead to the conclusion that any state interest in perpetuating no-fault divorce is indefensible from any reasonable point of view, whether economic or social; and, therefore, the state interest in no-fault is not truly legitimate when compared against Petitioner's claims to a fundamental and constitutional right. *See United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), where this Court held that the usual deference to legislative judgments as to the necessity and reasonableness of a particular measure is not necessarily warranted when a state is charged with impairing its own obligations. In the present case, California's no-fault law and its treatment of marriage as mere status contradicts the express statutory provisions treating marriage as contract. (See Civil Code Sections 4100 and 5100.) The remainder of this brief highlights some of the current research which would be available to the Court if the petition were granted, contravening the notion that no-fault advances a legitimate public purpose.

A. Family values were undermined.

Of all the failures of no-fault divorce, its lack of success in protecting and preserving the American family is most tragic. The entire reform began in response to these concerns over family stability by the initiation of a study "to identify problem areas and gather information with a view towards developing a legislative program to strengthen family relations."[4] Proponents felt that the fault system undermined legitimate marriages by asking the simplistic question of whether or not fault existed. In many cases, where the statutory requirements of fault were proven, but the marriage was still salvageable, courts terminated the marriage without further inquiry. This was a primary criticism of the 1966 California Governor's Commission.[5]

Attempts were made "to design a statute which accords with the state's interest in safeguarding the integrity of the family."[6] These legislative proposals were based on the presupposition that while the state had a duty to encourage viable families to remain intact, they also had an interest in providing a means for the convenient dissolution of marriages thought beyond the point of viability.[7]

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4. News Release from the Office of Assemblyman Pearce Young, 5th Assembly District, March 15, 1963.

5. Reprinted in MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 77 (1986) ("We believe that it is personally tragic and socially destructive that the Court should be absolutely required, upon proof of a single act of adultery or 'extreme cruelty' — perhaps regretted as soon as committed — to end a marriage which may yet contain a spark of life . . . . The marriage relationship is a deep and complex one, and should not be sundered by the law unless the Court finds that the legitimate objects have been irretrievably lost.")

6. Joseph Goldstein and Max Gitter *On Abolition of Grounds for Divorce: A Model Statute and Commentary* 3 FAM. L. Q. 81 ("Perhaps the most damaging result of a "fault"-based divorce procedure is that it exacerbates the aggressive forces that may be already undermining the family. It dissipates family emotional and financial resources at a time when they are most needed. The hatred, bitterness, and resentment fed by a drawn-out divorce are likely to destroy the possibility of conciliation and distort the negotiations and proceedings designed to resolve the very difficult and emotionally freighted issues of finances and child custody.")

7. *Id.* at 78 ("That concern [safeguarding the integrity of the family] led

Therefore, divorce law reformers claimed that the new law would strengthen the integrity of the family in two ways. First, the new law would simplify the divorce process so that marriages which were beyond the point of possible reconciliation could be easily dissolved without further animosity and bitterness. Secondly, in the cases where the marriage was viable, the court could encourage reconciliation.[8]

The legislation which was enacted as a result of these pro-family promises, rather than strengthening family relationships, has led to the demise and further erosion of the American family. While the goal of making the convenient dissolution of "impossible" marriages has been realized, at the same time, the new law makes it possible for viable marriages to be dissolved as well. Through removing legal barriers for "impossible" marriages, the law has encouraged viable marriages to be terminated.

Initially, no-fault's architects envisioned a means of separating salvageable marriages from impossible marriages and promoting reconciliation where possible. In California, the Family Court, which was designed to facilitate reconciliation, was abandoned in a last-minute compromise.[9]

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inevitably to the recognition that the state's overriding goal is not to preserve 'marriages' which are marriages in name only but rather to foster viable family relationships and, in the event of divorce, to minimize the damages to residual and reorganized family relationships. The concept of 'fault,' we conclude, and the process by which fault is established, undermine these stated goals and jeopardizes other important community values.")

8. Reppy, *supra* note 1, at 1311 (". . . The fault system was criticized because it frustrated the states' interest in preserving marriages which had not irreparably broken down. Despite the existence of technical fault--for example, adultery--a marriage might not be beyond repair. Yet, the fault-based system asked only, was there proof of the specified category of fault? If so, divorce was mandated, and the viability of the marriage relation was ignored.")

9. LENORE WEITZMAN, THE DIVORCE REVOLUTION 19 (1985) ("In the end, the law that was passed more closely resembled the one that the liberals envisioned. The Family Court was abandoned in a last-minute legislative compromise. . . . Thus the conservatives who supported the legislation because it promised to save troubled families found themselves without the tool that was designed to meet that need.")

Consequently, no-fault gives even less opportunity for the court to determine the viability of the marriage. While the fault provision gave a nonconsenting spouse a limited amount of power to prove that the marriage could be saved, a nonconsenting spouse under no-fault has no power to preserve the marriage. No-fault has had the effect of shifting "the power from the spouse who wants to remain married to the spouse who wants to get divorced."[10]

The second and greatest reason why no-fault divorce failed to protect the integrity of the family was that it dramatically transformed the definition of marriage. Through declaring that the marriage contract could be terminated at will, it reduced the traditional definition of marriage from a lifetime commitment to an at-will agreement which can be terminated over the objections of either party.[11]

Because of the fact that no-fault laws have resulted in more spouses making the decision to end their marriage, it is evident that no-fault divorce has damaged the American family. However, until recently, the extent of no-fault's failure was not fully understood. While it is a well- known fact that divorce is a painful experience, the full nature of the damage of divorce is not comprehended by many. Indeed, couples who enter a divorce hoping for a convenient solution to a strained relationship often find that they and their children face even greater problems created by the divorce.

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10. *Id.* at 27.

11. R. M. Redman, *Matters of Consequence: If Fault Finding in Divorce is an Anachronism, Then So is Marriage*, 29 ADVOC. 5, 6 (1986) ("It is this traditional concept of marriage, the lifetime bonding of a man and a woman, to their mutual benefit and to the benefit of society, that the law has fostered and wishes to protect for its own sake. It is this institution that the concept of no-fault divorce helps to destroy."); Weitzman *supra* note 9, at 368-369 ("The new divorce laws no longer assume that marriage is a lifelong partnership. Rather, it is now seen as a union that remains tenable only so long as it proves satisfying to both partners. In addition, the traditional obligations of marriage, like the institution itself, are increasingly being redefined by the new divorce laws as optional, time-limited, contingent, open to individual definition, and, most important, terminable upon divorce.").

• ***STRESS***

In spite of no-fault's attempts to remove the pain and stress from divorce proceedings, divorce remains a traumatic experience for all parties involved. One study found that "divorce and marital separation consistently rank second and third in a list of 42 stressful life events; the death of a spouse is the only event considered to require greater readjustment."[12]

• ***HEALTH***

Because of the fact that stress and anxiety often lead to physical problems, it is not surprising that those who are divorced and their children often experience health problems in greater numbers and severity than those married or single. "Premature death rates—deaths between the ages of 15 and 64—are significantly higher from a number of diseases among divorced men and women compared to married persons the same sex and age."[13] Another study of 17,110 children found that children who grow up in divorced families have a much greater propensity for ill health than children living with both biological parents.[14]

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12. T. Homes and R. Rahe, *The Social Readjustment Scale*, 11 J. OF PSYCHOSOMATIC RESEARCH 213-218 (1967). See generally, Bruce Dohrenwend and Barbara Dohrenwend, *Social Status and Stressful Life Events*, 28 J. OF PERSONALITY AND SOC. PSYCHO. 225 (1973) Weitzman *supra* note 9 at 349; ("While both sexes 'share' some of the psychic and physical distress of divorce, women seem to experience the greater stress, and their stress seems to take a higher toll.")

13. H. CARTER AND PAUL GLICK, MARRIAGE AND DIVORCE: A SOCIAL AND ECONOMIC STUDY, AMERICAN PUBLIC HEALTH ASSOCIATION, VITAL AND HEALTH STATISTICS MONOGRAPH (1970); (Divorced men were twice as likely as their married counterparts to die early from cardiovascular disease, stroke and hypertension. They were seven times more likely to suffer death by pneumonia. White divorced males were four times more likely to commit suicide than those who were married).

14. Deborah Dawson, *Family Structure and Children's Health and Well-Being: Data From 1988 National Health Interview Survey on Child Health*, 53 J. MAR. AND FAM. 573, 578 (1991) ("Compared to children living with both biological parents, children living with formerly married mothers had about 50% greater risk of having had asthma in the preceding 12 months. For children living with never-married mothers, the risk was reduced by about two-thirds. There was an increased risk of frequent headaches among both children living with formerly married mothers and those living with mothers and stepfathers. . . .")

• ***FINANCIAL***

Rarely after a divorce do women fare financially better than their male counterparts. A 1989 study found that "in the initial years of divorce, economic well-being declines by more that 30 percent and remains at that same low level" for years for women who do not remarry.[15]

Children of divorce today are disproportionately living in poverty. Eighty percent of children who grow up in a two-parent household never experience poverty during the first ten years of their lives. By contrast, only twenty-seven percent of children living in single-parent households maintained the same high standard.[16]

These tragic findings have been confirmed by the U.S. Department of Commerce, Bureau of the Census.

> Children whose father would leave saw their mean monthly family income fall from $2,435 four months before he left to $1,543 four months after he left, a 37 percent drop. Mean family income of these children fell to only 59 percent of those in two-parent families ($1,815 versus $3,060) over the course of the 28 months after the first interview. While mean monthly income rose an average of $226 for two-parent families over this period, it dropped $531 for those with a departing father.[17]

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15. Kate Stirling, *Women Who Remain Divorced: The Long-Term Economic Consequences*, 70 SOCIAL SCIENCE QUARTERLY 549-561; *See* Weitzman *supra*, note 15, at 323 (finding that "divorced women and their households experience a 73 percent decline in their standard of living in the first year after divorce.")

16. William Galston, *A Liberal-Democratic Case for the Two-Parent Family* THE RESPONSIVE COMMUNITY 14, 17 (1990) (finding that "[i]f a reasonable level of collection and payments were achieved, absent fathers would contribute at least $25 billion more each year than they do today. . . .); *See* Weitzman *supra*, note 9, at 192; (reporting that "within six months of the divorce decree, one out of six men was already in arrears on alimony payments, owing on the average, over $1,000.")

17. *The Economics of Family Disruption*, STATISTICAL BRIEF, BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, March 1991.

• ***EDUCATION***

It is not surprising that children who have been victims of divorce have more difficulties in school.

> Children from disrupted marriages were over 70% more likely than those living with both biological parents to have been expelled or suspended; those living with never-married mothers were more than twice as likely to have had this experience. Children who did not live with both biological parents were 45% to 95% more likely to have been the subject of a parent-teacher conference than those who did live with both biological parents.[18]

There is reason to believe that these educational problems are often linked to behavioral difficulties which inhibit learning. Further research confirms that children of divorced parents usually have such behavioral problems.[19]

• ***SUICIDE***

When spouses reject each other, their children often feel rejected as well. Consequently, rejection by parents leads to rejection of self, depression, and suicide. The remarkably high suicide rate of children from divorced families is alarming.[20]

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18. Dawson *supra* note 14, at 578-579.

19. Carolyn Webster-Stratton, *The Relationship of Marital Support, Conflict, and Divorce to Parent Perceptions, Behaviors, and Childhood Conduct Problems*, 51 JOURNAL OF MARRIAGE AND THE FAMILY 417-430 (1989). (This study analyzed behavioral patterns of three categories of households: 1) single-parent households; 2) married-couple households reporting a satisfactory marriage, and; 3) married-couple households reporting an unsatisfactory marriage. While the smallest amount of behavioral problems were found in children of households reporting a satisfactory marriage, there were significantly more behavioral problems found in children whose parents reported an unsatisfactory marriage. However, the greatest number of behavioral problems were found in single-parent households.)

20. Nelson, Farberow and Litman, *Youth Suicide in California: A Comparative Study of Perceived Causes and Interventions*, 24 COMM. MENTAL HEALTH J. 31-42 (1988); John S. Wardarski and Pamela Harris, *Adolescent Suicide: A Review of the Influences and Means for Prevention*, 32(6) SOCIAL WORK 477-484 (1987); (finding that one of the primary causes of teen suicide, the second leading cause of death among adolescents, is family instability or disruption. It is significant that children who lose a parent through death usually do not become more suicidal. This suggests the perception of being rejected by a parent rather than simply the loss of a parent tends to lead teenagers to end their own lives.)

• ***CRIME***

The lack of parental supervision which often accompanies a divorce causes many children to come under harmful influences which lead to criminal activities. Recent studies demonstrate a strong correlation between our nation's high prison population and the breakdown of the family.[21]

• ***DRUG ABUSE***

One of the most serious crises America faces today is that of the use of illicit drugs. Studies that show a link between drug abuse and broken families demonstrate that the decay of the family has brought with it many other serious consequences.[22]

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21 R. Sampson, *Crime in Cities: The Effects of Formal and Informal Social Control*. In M. TONRY & MORRIS, CRIME AND JUSTICE 271-301.(1987) (finding that in American cities with populations exceeding 100,000, divorce rate had the strongest correlation with robbery rates. This relationship was present regardless of the socioeconomics and racial composition of the city.) Douglas A. Smith, G. and Roger Jarjoura, *Social Structure and Criminal Criminal Victimization* 25 JOURNAL OF RESEARCH IN CRIME AND DELINQUENCY, 27-52 (1988); (reporting that rates of violent crime and burglary have been shown to be strongly associated with the number of single-parent households with children aged 12 to 20); B. Chapman, *Fairness For Families: An Organizing Theme For the Administration's Social Policies*, 2 THE JOURNAL OF FAMILY AND CULTURE, 23 (1986) (finding that half of the inmates of state correctional facilities had grown up without the benefit of a two-parent family. Some 36% had grown up in a single-parent household, compared with 17% of the general population. Some 17% of inmates in other arrangements compared with 4% of the general population in this category.) R. Knight and R. Prentky, *The Developmental Antecedents and Adult Adaptations of Rapist Subtypes*, 14 CRIMINAL JUSTICE AND BEHAVIOUR 403-426, (1987); (finding that in a study of 108 violent rapists, half had grown up without the benefit of a two-parent family. A study of those who were repeat offenders found most came from single-parent homes and more than half had come from divorced families.)

22. Stein, Newcomb and Bentler, *An 8-Year Study of Multiple Influences on Drug Use and Drug Use Consequences*, 22 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY, 1094-1105 (1987) (Inadequate family structure and lack of positive family relationships often lead to substance abuse as a coping mechanism to relieve anxiety and depression. Children's reactions to parents' divorce can include rebelliousness, which leads to poor selection of friends and a greater likelihood for drug use.)

• ***SECOND-GENERATION DIVORCE***

Parents' decision to divorce sends a message to their children about the value and role of a family. Those values provide a basis on which the child makes his or her value choices. Statistics show that when parents divorce, they automatically increase the chances that their children will follow in their steps.[23]

Because of overwhelming evidence of the negative impact of no-fault divorce on the American family, it is clear that no-fault, rather than being a solution for the American family, has been extremely detrimental.

B. The rate of divorce increased under no-fault.

One of the primary objectives of the no-fault legislation was "to stem the rising tide of divorce."[24] The years preceding the enactment of no-fault divorce in California had seen an increase in the number of divorces not only in California but also throughout the entire nation. The Interim Committee reported that California in particular had a divorce rate disproportionate to the rest of nation. "In 1960, the ratio of divorces to marriages was 47 percent in California, compared to 26 percent elsewhere in the United States."[25] For this reason, Governor Brown asked that his

23. Norval D. Glenn and Kathryn Kramer, *The Marriages and Divorces of the Children of Divorce*, 49 J. OF MAR. AND FAM. 811-825 (1987); (examined data from 11 national surveys and found the divorce rate 59 percent higher among white females whose parents had divorced, compared with those from intact families. For white males the rate was 32 percent higher for those coming from disrupted families); Sarah McLanahan, *Family Structure and Dependency: Early Transitions to Female Household Headship*, 25 DEMOGRAPHY 1-16 (1988) (Daughters, white or black, between the ages of 12 and 16 who live with unmarried mothers are at least twice as likely to become single parents themselves. However, the risk for whites was no greater for divorce when living with a widowed mother than those living in a two-parent family. Thus, mere parental absence cannot explain the effect, but the dynamics of having a family severed through divorce increased the daughters' risk for future divorce themselves.)

24. MAX RHEINSTEIN, MARRIAGE, STABILITY, DIVORCE AND THE LAW 373 (1972)

25. Final Report of the Assembly of the Judiciary, 1965, pp. 50-51.

Commission on the Family carry on "a concentrated assault on the high incidence of divorce in our society and its often tragic consequences."[26] The proponents of no-fault argued that the new law would promote reconciliation and thereby reduce the number of divorces by removing the adversarial nature of divorce proceedings.[27]

No-fault's critics questioned the logic of reducing divorce rates by making divorce more available. Some scholars warned that the divorce rate would increase rather than decrease.[28] The past two decades have demonstrated that those who predicted that no-fault would not stop the rising divorce rate were accurate. It is indisputable that divorce rates have continued to climb unchecked by the enactment of the new permissive divorce laws.[29]

Although it is agreed that no-fault has not stopped the rise in divorce rates, there is a tremendous amount of debate as to whether or not the new laws have compounded the divorce rate problem. Several commentators have argued against a cause-effect relationship between the enactment of permissive divorce laws and an increase in the divorce rate, stating that

26. Governor Edmund Brown, *Charge to the Commission*, May 11, 1966.

27. Thomas Marvell, *Divorce Rates and the Fault Requirement*, 23 Law & Soc'y. Rev. 543, 545 (1989) (stating that "[. . .] some have claimed that no-fault laws might prevent divorces because the acrimonious proceedings under the old laws hindered reconciliation and because the new laws could provide for mediation services.") .

28. *Id.* at 545 ("Several of the reformers' arguments . . . did imply that the no-fault laws would lead to more divorces. They often said that seeking a divorce may have been deterred because the old laws required excessive legal expense, and the proceedings were designed to produce 'evidence' of malfeasance.") *See* Timothy B. Walker, *Beyond Fault: An Examination of Patterns of Behaviour in Response to Present Divorce Laws*, 10 J. Fam. L. 267, 296 (1970); Steward A. Brody, *California's Divorce Reform: Its Sociological Implications*, 1 Pac. L.J. 223, 226 (1970) ("There are some features of the Family Law Act which may tend to encourage further increases in California's marital dissolution rate.")

29. The National Center for Health Statistics has reported a substantial increase nationwide in the divorce rate during the past two decades. The rate per thousand population was 3.5 in 1970 and rose substantially to 4.7 in 1990.

other factors are to be blamed for the rise.[30] These studies assert that because no-fault was practiced underhandedly by the courts for many years, it is impossible to determine the point at which no-fault began.[31] No-fault advocates blame subsequent rising rates not on the new law, but on a national trend that had begun at the turn of the century. They argue that this rise can be attributed to the changing attitudes toward divorce by the general public, not the new law.

To argue that this "abrupt and profound change in the formal American divorce laws"[32] had no effect on the divorce rate is to naively perceive California's divorce reform and to ignore its pedagogical impact on divorce and marriage.[33] It is apparent that "a radical change in the rules for ending a marriage inevitably affects the rules for marriage itself and the intentions and expectations of those who enter it."[34] The fact is irrefutable that a drastic change in American family law was correlated to a drastic rise in the divorce rate.

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30. HUBERT O'GORMAN, LAWYERS, AND MATRIMONIAL CASES: A STUDY OF INFORMAL PRESSURES IN PRIVATE PROFESSIONAL PRACTICE (1963) *See* Lawrence Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649 (1984).

31. Although the old law technically required proof of fault, many judges granted divorce decrees without proof of fault. Therefore, no-fault defenders claim that it is impossible to establish the precise starting point of no-fault divorce.

32. Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. 79 (1991).

33. Glendon *supra* note 5, at 9 ("Law is constitutive when legal language and legal concepts begin to affect ordinary language and to influence the manner in which we perceive reality. . . . This way of looking at law suggests a number of questions . . . in the context of divorce and abortion law.")

34. Weitzman, *supra* note 9, at 366-367 (1985) ("The divorce law revolution transformed more than the traditional legal assumptions about divorce. It transformed the legal norms for marriage by articulating, codifying, and legitimating a new understanding of the marital partnership and marital commitment in our society. The new laws reflected, among other things, altered social realities, evolving social norms, and everyday legal practice. Ideally, that is as it should be: if law is to be effective, it must accord with social and practical reality. However, because the present laws do not adequately or accurately reflect social reality, they are exacerbating some of the grossest inequities in our society.")

A recent study, conducted by Thomas B. Marvell, demonstrates the flaws of many prior research methods which found no correlation between the fault requirement and divorce rates.[35] Marvell's study analyzed figures from thirty-eight states and concluded that no-fault laws caused a significant increase in the divorce rate. Marvell found that "in eight states did lead to more divorces [36]. . . . There is some, but lesser evidence of the laws' impact in eight more [37]. . . . A rough estimate of the magnitude of the effect of these states is that, on the average, the no-fault laws increased divorces by some twenty to twenty-five percent."[38]

Marvell's study revealed that California and New York, experienced the most drastic increases. The year following the enactment of permissive divorce laws, New York divorces increased from 7,136 to 14,861.[39] Likewise, California divorces increased from 81,546 to 112,942.[40] In both cases, the increases before enactment were considerably smaller. In fact, in several of the years prior to the law's passage in New York, the divorce rate had actually fallen.[41] Professor Marvell concludes that "no fault laws, operationalized as a single variable, had a significant impact on divorce rates. . . ."[42]

C. The integrity of the judicial process was compromised.

A fault-based system did not exist without its critics. While most litigants settled the issue by default, the contested cases were unpleasant occasions, testing the

35. Marvell, *supra* note 27, at 543.

36. These states are California, Delaware, Florida, New Jersey, North Carolina, Pennsylvania, Rhode Island, and South Carolina.

37. These states are Alabama, Connecticut, New Hampshire, New York, Vermont, Virginia, West Virginia, and Wisconsin.

38. Marvell, *supra* note 27, at 559 to 563.

39. *Id.* at 551.

40. *Id.* at 551.

41. *Id.* at 551.

42. *Id.* at 563.

capacity of the court to weigh conflicting evidence. [43] One of the chief goals of the no-fault movement was to restore the integrity of the legal profession by replacing the fault system with a new law which would meet the "current and changing needs of modern society."[44]

While evidence for dissolution is required under no-fault, the standard changed to a subjective perception that irreconcilable differences have arisen such as have caused an irremedial breakdown of the marriage.[45] While previously judges applied objective categories to assess evidence, this new evidentiary standard (irreconcilable differences) requires no adjudicatory role for the court. Having no objective criterion, judges have nothing to guide them save the subjective impression of one of the parties. After no-fault, judges have been reduced to clerks.

Thus, the scenario found in the trial of the petitioner in the case that is before this Court happens again and again. At the trial, counsel for the petitioner attempted to present evidence

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43. Glendon, *supra* note 5, at 96 ("Members of the bar labeled the divorce courts 'quasi-criminal,' and it was charged that the proceedings tended to 'demean . . . human relations.' The fault grounds for divorce were recognized as mere 'legal fictions' which promoted 'popular unrealism as to the nature of marriage.'" Reppy at 1312: "Prior to no-fault divorce, we heard a great deal about how deplorable it was that the only contact most people had with the legal system was routinely characterized by collusion and perjury. A major argument for moving to objective grounds for divorce was that this would restore respect for the administration of justice.")

44. Goldstien and Gitter, *supra* note 6, at 80 (1969) ("The respect and standing of the legal community can only benefit by the repeal of a system which produces collusion, perjury, and hypocrisy, and which forces upon judges tasks alien to their special competence.")

45. California Governor's Commission of the Family, Final Report 23 (1966) ("We cannot overemphasize that this standard does not permit divorce by consent, wherein marriage is treated as wholly a private contract, terminable at the pleasure of the parties without any effective intervention by society. The stand we propose requires the community to assert its interest in the status of the family, and permits dissolution of the marriage only after it has been subjected to a penetrating scrutiny and the judicial process has provided the parties with all of the resources of social science in aid of conciliation.")

to the court that the California statutory requirement of irreconcilable differences had not been proved. In response to this claim, the judge made the following statement which reflects the prevailing opinion of many judges today. "I'm not going to waste very much time on this, because I disagree with that 100 percent. It's virtually a presumption of irreconcilable differences, when one of the parties gets up there and says 'I don't want to live with him anymore.' "[46] Whether one agrees or disagrees with the concept of no-fault divorce, it is uncontestable that the irreconcilable differences are not being proved.

Therefore, the charade on the domestic relations courts is worse than the alleged ritual prior to no-fault. The law now presents a facade of genuine adjudication when, in fact, it provides no real legal process at all.

CONCLUSION

For the above stated reasons the *Amici* respectfully ask this Court to accept this case for review and reverse the decision of the California Court of Appeal.

Respectfully submitted,

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Date: February 24, 1992

46. See Brief of the Petitioners at 5.

APPENDIX

Institute in Basic Life Principles

The Institute in Basic Life Principles is a not-for-profit educational organization, founded on the presupposition that strong families are the basis of a strong nation. The Institute conducts Seminars across the nation to promote healthy familial relationships. During the past twenty-six years, the Institute has conducted Seminars in major cities throughout the United States, Russia, Canada, Mexico, and New Zealand. Over 2 million alumni have attended through word of mouth recommendation.

One of the primary purposes of the Seminar is to restore familial relationships that have eroded as a result of a lack of understanding of the principles of marriage harmony. Through an understanding of basic principles of marriage and the implementation of certain commitments, literally thousands of couples involved in serious conflicts have seen their relationships restored.

The Institute's particular concern in this case involves the detrimental societal, economic, and moral consequences which have resulted from the passage of the no-fault divorce laws of California. Through making divorce an "easy and convenient solution," no-fault laws have invited couples to dissolve their marriages when their differences could have been resolved otherwise.

Focus on the Family

Amicus Curiae, Focus on the Family is a non-profit organization committed to strengthening the psychological and spiritual health of families in the United States and throughout the world. Its daily radio broadcasts dealing with family issues reach more than one million listeners each day. Its monthly magazine has a circulation of 1.7 million.

Family Research Council

Amicus Curiae, Family Research Council is a division of Focus on the Family and acts as its voice for the pro-family movement in Washington, D.C. It provides policy analysis and research support for Focus on the Family.

In the work of family policy analysis and of counseling both *amici* are concerned with the regimes of unilateral at-will divorce now prevailing throughout the United States. They actively seek to mitigate and ameliorate the terrible impact of divorce on spouses and children. Focus on the Family seeks through counseling, broadcasts, and publications to heal the wounds of divorce, and wherever possible, to heal fractured marriages. The Family Research Council seeks to analyze the impact of divorce on the institution of the family and the impact of divorce on divorce rates. It works with those who are seeking, through legislation and through legal defense, to foster a law regime more supportive of family stability.

Concerned Women for America

Concerned Women for America (CWA) is a national non-profit organization representing approximately 700,000 persons across the United States, whose purpose is to preserve, protect and promote traditional, Judeo-Christian values through education, humanitarian aid, legal defense, promoting legislation, and related activities in furtherance of its members' concern for these values. The CWA Legal Foundation has previously submitted an *amicus curiae* brief to this Court in cases related to family issues. CWA is particularly concerned with the harm to children and families through unrestricted divorce.

Free Congress Research & Education Foundation

Amicus, Free Congress Research & Education Foundation is a non-profit public policy research institute. *Amicus*

believes that public policies can either strengthen or undermine the traditional family, and that society will benefit or suffer accordingly. To that end, *amicus* has published monographs and contributed in other ways to the debate over divorce and its impact on the institutions of marriage and the family and to the health and welfare of children. *Amicus* believes that public policy relating to divorce is of fundamental importance and must be openly and thoroughly explored in all its facets. This case can contribute to that process.

Evangelical Child & Family Agency

The Evangelical Child & Family Agency is a community social service which has for forty-two years provided adoption, foster care, counseling and other family services. It is licensed and serving as a child and family welfare agency in both Illinois and Wisconsin, and last year provided services to nearly nine hundred people. In the course of its services it frequently encounters cases of marital problems and has seen in its practice that while divorce in any case tends to greater hardship and poverty for wives and children, the growth of divorce at the unfettered will of one party creates greater harm for children and families with no compensating benefit.

New Life Family Services

New Life Family Services (NLFS), established in 1973 to provide adolescent group homes and later licensed by the State of Minnesota for adoption and foster care, now provides these and other family services in five cities. NLFS is committed to restoring the family, as the basic unit of society by helping family members work through difficulties and crises. More that 1,400 volunteers trained in counseling or various other capacities donate over 74,000 hours annually. NLFS finds that family conflict can often be

ameliorated despite negative expectations of one or even both spouses, and that unnecessary family breakdown is promoted by factors which facilitate quick and unrestricted divorce.

Traditional Values Coalition

Traditional Values Coalition (TVC) is a grass roots, pro-family organization that represents individuals, families and churches in public policy.

The Coalition for the Restoration of the Black Family and Society (CRBFS), a division of Traditional Values Foundation, is a pro-family, grass roots organization that works to empower black Americans for self-help, free-market principles and family values.

TVC and CRBFS are educational and lobby organizations in our nation's capital and in many state legislatures. TVC and CRBFS have encountered many problems as a result of "no-fault" divorce, especially with the consistent harm it does to children. It is their belief that "no-fault" divorce increases the impoverishment of custodial parents and their children, with no real public policy or social benefit. In fact, it seems that acrimonious disputes have actually grown more common under "no-fault," and "no-fault" has evolved into a commonly used, state-sanctioned vehicle for a spouse to avoid his/her responsibility to his/her family.

Historically, strong families have been the hallmark of the community. Whether nuclear or extended, they project values, morals and traditions that encourage individuals to be productive. The by-products of "no-fault" divorce have contributed to the deterioration of families, thereby weakening the pillars that support this great nation.

Family Values Alliance

Family Values Alliance is a Washington state not-for-profit corporation dedicated to strengthening families. Among its

many activities, Family Values Alliance sponsors a monthly forum of Northwest pro-family leaders, distributes over 100,000 mailings annually to Northwest residents, providing information and background on family issues, and maintains a speakers' bureau of professionals who support traditional family values. Family Values Alliance is gravely concerned about the heavy personal and social costs which have resulted from a high divorce rate. It has provided background information and public policy support for those who seek to change Washington state's no-fault divorce law.